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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000393-MR

JOSEPH D. TURNAGE

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 14-CR-00168

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT, JUDGES.

D. LAMBERT, JUDGE: Joseph D. Turnage (Turnage) brings this appeal from a conviction in the Muhlenberg Circuit Court. The sole issue is whether, under Kentucky Rule of Evidence (KRE) 404(b), the trial court erred in permitting a witness to testify that she had seen a man fitting Turnage's description leaving her

car which had recently been rifled through. After a careful review of the record and the applicable law, we affirm.

Relevant Facts

On September 4, 2014, a person entered a vehicle belonging to Amanda Travis (Travis), which was parked in her driveway. Though the contents appeared to have been rummaged through, nothing was taken. Travis testified that her children informed her that someone had entered her vehicle, but that she did not go outside immediately. When she did, she noticed that her car door was open and that the dome light was on. Travis saw a person walking away from her lawn, but did not see his face. She then called 911 and Detective Will Ward (Detective Ward) responded. Travis told Detective Ward that she had seen a man wearing a blue shirt, blue jeans and a hat, and that the man staggered as if drunk.

While driving, Detective Ward saw Turnage, who was wearing a blue shirt, blue jeans and a hat. Turnage did not turn around when Detective Ward activated his blue lights. When Detective Ward turned his spotlight on Travis, Detective Ward saw Turnage throw a bag into a ditch on the side of the road. Detective Ward asked Turnage to stop, and he did. Detective Ward stated that Turnage appeared to be drunk.

The bag that was thrown into the ditch contained a laptop belonging to Teresa Pendley (Pendley). When Detective Ward went to the Pendleys' home

address, Denny Pendley, Teresa Pendley's husband¹ realized that the family car, which had been pulled into the attached garage, had been burglarized.

Turnage was indicted in the Muhlenberg County Circuit Court for burglary in the second degree, tampering with physical evidence and being a persistent felony offender in the first degree.

At trial, Travis testified concerning the events surrounding her discovery of the man she had seen walking away from her car. Defense counsel contemporaneously objected. At the conclusion of Travis's testimony the trial judge admonished the jury that they should only consider this evidence to the extent that it shows guilt with regard to the charged crime and not evidence of any other crime.

Turnage was convicted of all charges and was sentenced to ten years in prison. This appeal follows.

Analysis

Turnage's sole argument on appeal is that Travis's testimony that she saw a man walking away from her vehicle should be excluded on the basis that it is impermissible prior bad act evidence. This issue was preserved because Turnage's trial counsel obtained a written ruling on the matter before trial. "A motion in limine resolved by order of record is sufficient to preserve error for appellate review." KRE 103(d). The trial court admitted Travis's testimony on the basis

¹ Teresa Pendley was out of town that day.

that Travis's testimony established a plan on the part of Turnage to steal from vehicles.

KRE 404(b) provides that

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The Kentucky Supreme Court has stated that even when “evidence that establishes *modus operandi* is offered for a purpose other than to prove identity, the evidence is treated ‘as if offered to prove identity by similarity, and ... the details of the charged and uncharged acts [must] be sufficiently similar as to demonstrate a *modus operandi*[.]’” *Newcomb v. Commonwealth*, 410 S.W.3d 63, 74 (Ky. 2013) (quoting *Billings v. Commonwealth*, 843 S.W.2d 890, 893 (Ky. 1992)). Furthermore, our Supreme Court “require[s] the proponent of the evidence to ‘demonstrate that there is a factual commonality between the prior bad act and the charged conduct that is simultaneously similar and so peculiar or distinct that there is a reasonable probability that the two crimes were committed by the same individual.’” *Clark v. Commonwealth*, 223 S.W.3d 90, 97 (Ky. 2007) (quoting *Commonwealth v. Buford*, 197 S.W.3d 66, 71 (Ky. 2006)).

The Commonwealth is correct that the length of time between the charged offense and the prior bad act is relevant to a prior bad act's admissibility. Our Supreme Court has held that "evidence of another crime, committed close in time, with a common scheme, is probative to identify the perpetrator of the offense charged." *Funk v. Commonwealth*, 842 S.W.2d 476, 480 (Ky. 1992). *See also Violett v. Commonwealth*, 907 S.W.2d 773, 775 (Ky. 1995) ("The pattern of behavior and conduct was strikingly similar and it was sufficiently close in time.") Here, evidence put Turnage in approximately the same location at approximately the same time wearing the same outfit and staggering as if intoxicated in both the prior bad act and the charged crime. These circumstances show "a reasonable probability that the two crimes were committed by the same individual." *Clark*, 223 S.W.3d at 97. *See also Southworth v. Commonwealth*, 435 S.W.3d 32, 53 (Ky. 2014) ("If the proof in this case is to be considered *modus operandi*, then there must be such similarity between the proof offered and the facts at trial that the identity of the defendant can be determined from the similarities."). Because the charged offense was sufficiently similar to the prior bad act, the trial court did not err in admitting the evidence as *modus operandi*.

This particular evidence, however, more neatly fits under the "inextricably intertwined" KRE 404(b) exception because the prior bad act explains the context behind the charged offense. In *Kerr v. Commonwealth*, Kerr had two outstanding warrants. 400 S.W.3d 250, 254 (Ky. 2013). The police received an anonymous tip that Kerr was selling narcotics, and they began

monitoring his apartment. *Id.* Eventually, Kerr was indicted for charges relating to selling narcotics. *Id.* at 255. Our Supreme Court held that the arrest warrants were admissible under KRE 404(b), because they were inextricably intertwined with the charged offense:

The existence of the arrest warrants here was necessary to an adequate understanding of the context of the officers' conduct—it provided the setting and context of the events surrounding the officers' surveillance of Kerr's guest room. And, as in *Clark*, the evidence provided the setting and context of the discovery of the crime. Excluding the reason why police were observing Kerr and why they arrested him, thereby gaining access to the contraband, would have left the jury with an incomplete and fragmented picture of the circumstances surrounding how the drug trafficking was discovered. And, as discussed above, it would have left the jury with an unfounded doubt regarding the legitimacy of Kerr's initial arrest. The purpose of the arrest-warrant evidence was "to complete a picture by providing context and meaning for the central events, not to paint other pictures of criminality or misbehavior."

So we hold that the arrest-warrant evidence is inextricably intertwined with the charged crimes because it was relevant to the context of the police surveillance, Kerr's arrest, and discovery of the crime.

Id. at 262-263 (footnotes omitted). *See also Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky. 2003) ("KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation.").

The present case is similar to *Kerr*. If the Commonwealth were not permitted to present testimony concerning a man rummaging through Travis's car, the jury would not know why Detective Ward talked to Turnage on the day Turnage was arrested. This was essential to a complete understanding of the

events leading up to Turnage's arrest because Detective Ward only discovered Pendley's laptop after he stopped Turnage. Furthermore, it was only through Travis's description that the police were able to identify Turnage in order to ask him to stop. Therefore, excluding evidence that Travis saw a man walking away from her recently rummaged-through car "would have left the jury with an incomplete and fragmented picture of the circumstances surrounding how the [theft] was discovered[]" under *Kerr, supra*. Because the evidence that Travis had seen a man rummaging through her car helped provide context for Turnage's arrest, it was also admissible on that basis.

However, this evidence must still be relevant to be admissible. KRE 401 states that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 401 is satisfied because the evidence in question tends to prove the reason that police were searching for Turnage. KRE 403 is also satisfied. Travis's testimony had significant probative value because it was relevant to prove Turnage's identity and to present a complete picture of the crime and investigation. Furthermore, Turnage received an admonition on this issue. Turnage's trial counsel's initial request for an admonition at trial was

denied. After Travis finished testifying, however, the judge asked defense counsel and the Commonwealth to approach. The trial court asked defense counsel if she desired an admonition on this issue. She stated that she did, informing the judge that she believed that an admonition was “the appropriate way for it to work” and that “it can come in just for the reasons that it can come in.” The trial court then provided the following admonition:

Ladies and gentlemen of the jury, I must admonish you at this time that the incident at the residence of this last witness that involved her vehicle, that was referenced by her in her testimony, that particular incident, for which the defendant is not now on trial, is not be considered by you except insofar as it may tend to show, if it does, the defendant’s identity, knowledge, intent, pattern of conduct or plan or scheme on his part.

Neither Turnage’s trial counsel nor Turnage’s appellate counsel have argued that the trial court’s admonition was insufficient, and reviewing courts “will not presume improper jury conduct when a limiting instruction was provided and the defendant failed to present any argument to rebut the presumption that the trial court’s admonition cured the error.” *Webb v. Commonwealth*, 387 S.W.3d 319, 326-27 (Ky. 2012). Because Turnage received a sufficient admonition, his potential for prejudice was low, and the probative value of this evidence was not substantially outweighed by the danger for unfair prejudice under KRE 404(b). No error occurred.

Conclusion

In sum, we hold that the trial court did not abuse its discretion in allowing in Travis's testimony, as it constituted evidence of Turnage's *modus operandi* and was inextricably intertwined.

The judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

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